

OLC 73-0544

OGC 73-0780

3 May 1973

OGC HAS REVIEWED.

MEMORANDUM FOR THE RECORD

SUBJECT: May 1973 Meeting of ICRC

1. The Interagency Classification Review Committee met yesterday at 1000 hours in the Roosevelt Room of the White House with Archivist James Rhoads the new Acting Chairman presiding. Mr. James O'Neill, the Deputy Archivist of the United States, served as the Archivist member of the Committee. State was represented by Mark Feldman; Justice by Robert Dixon, the newly appointed Assistant Attorney General, Office of Legal Counsel; Defense by Robert Andrews and AEC by Charles Marshall. There was no representative from the NSC Staff.

2. Mr. Rhoads began the meeting by paying tribute to the work of Chairman Eisenhower. He said his own appointment is a temporary one and he hopes and expects a permanent successor will be found soon. Until that time he intends to do all he can to make the Executive Order work and he hoped and assumed all members had a similar determination. He suggested also that members should regard themselves not merely as representatives of their agencies but as watchguards of the entire government and as guardians of the public interest. He said he and Dick Tufaro had met with Frederic Malek, Deputy Director of OMB, who assured Rhoads of the President's continuing interest and support. He announced that the Committee is now moving out of the White House and into OMB. (I assume this means that Rhoads will report to Malek rather than to the successor to Haldeman or another White House staffer.) Mr. Rhoads felt that the move into OMB indicates more, rather than less, top level interest in the work of the Committee. He announced also the resignation from federal service of Dave Young and paid tribute to Young's service on the Committee. He expressed pleasure that Dick Tufaro will continue his work "at least for a period of time." He expressed a welcome to Mr. Dixon, Justice's new member who was attending his first ICRC meeting.

3. Mr. Rhoads announced that ICRC has been asked to testify on 9 May before the Muskie Committee. Mr. Dixon interjected to report that the Attorney General had testified on 10 April before a combined committee chaired by Senators Muskie and Ervin. The committee's jurisdiction involved executive privilege and government secrecy but Mr. Kleindienst had testified only on executive privilege. He had been scheduled to return on 9 May to testify on the remaining area but now it is contemplated that Attorney General Richardson will return to testify before that committee in June. It developed in the conversation that the ICRC representative will testify on 9 May because that time has now become available because of the postponement of the appearance of the Attorney General. Rhoads and Tufaro apparently are preparing Mr. Rhoads' testimony. It will report statistical progress under the Order; it will explain the work and role of ICRC and will set out the philosophical advance of E.O. 11652 over E.O. 10501. A draft of the statement is to go to all members by this Friday, 4 May, and comments are welcomed. The testimony also is to have OMB approval.

4. Mr. Rhoads then addressed himself to item 3 on the Committee agenda, namely the proposal by AEC to amend the Executive Order so as to divorce the exemption authority and Top Secret authority. (Under the Order only officials authorized to classify at Top Secret may exempt from automatic declassification any classified document.) This was discussed at some length. The AEC position was that at AEC Top Secret authority is exercised with great restraint, the exemption authority less so and the latter is performed by officials acting pursuant to so-called exemption guidelines which AEC has issued. He felt exemption would be performed with more restraint and indeed fewer documents would be exempt if an amendment were adopted. Defense and several others were prepared to live with the Executive Order as is. They felt the present system is costly but they were prepared to accept it. Several, including Mr. Houston, indicated the present situation is satisfactory so long as broad exemption guidelines are permissible. In the absence of such guidelines, CIA would have to increase its number of Top Secret classifiers significantly. Mr. Ulman, who attended with Mr. Dixon of Justice, opted for separation of the two authorities. Mr. Feldman also supported divorce. Chairman Rhoads suggested it might be well to defer solution until the first quarterly reports are in which would show at least an estimate or approximation of the percentage of documents being exempted by various departments. He wondered if agencies

could somehow tighten up their exemption practices. He wound up appointing an interagency group to study this general subject in broad terms. The group's charter is to study the most effective ways to hold to a minimum the exemption of documents. This would include use of guidelines, divorce of Top Secret authority from exemption authority and any other aspects. He also asked that the group be chaired by a department which does not use guidelines and therefore asked that the State representative be chairman.

5. Mr. Rhoads passed out a brochure entitled "Know Your Rights to Mandatory Review to Classified Documents", which is proposed as an ICRC handout to the public. A copy is attached. All comments are invited and we are asked to submit our comments in not more than two weeks. It was not suggested that the Committee should decide on the desirability of issuing the brochure; that decision apparently having been made by Rhoads or Tufaro or both. We of course can object to its issuance if we want to.

6. The Chairman then moved to item 5 of the agenda concerning automatic declassification under the old Executive Order. The problem is that in some quarters the Order is being interpreted to the effect that because Group 3 information under E.O. 10501 is excluded from the General Declassification Schedule of E.O. 11652, the information in that Group does not automatically declassify at all. Tufaro suggested that such surely was not the intent and indeed if that is a correct reading of the repeal of 10501, it would mean that 11652, in this area at least, is retrogressive. Tufaro offered as a solution to this problem a document entitled "Letter of Interpretation" to be signed by Rhoads as Acting Chairman which would provide that Group 3 materials would continue to automatically ^{declassify} under Section 4(A)(3) of E.O. ¹⁰⁵⁰¹ 11652. Most of the Committee felt this would be a satisfactory solution. But Defense is concerned that the letter is legally incorrect because in their view E.O. 10501 is totally dead and has no continuing operation. In view of this, Justice was asked to determine whether a letter such as the proposed one could be the device by which this problem is solved.

7. Mr. Rhoads asked Mr. Houston to report on our progress on the AP appeal. Mr. Houston reported our actions of sanitizing and declassifying a number of documents and requesting other departments to concur in additional declassification.

8. Mr. Rhoads requested that all members play a part in their agencies' communications to people who request declassification to be sure that replies correctly inflect the spirit and tone of the Executive Order.

9. The testimony of Harding Bancroft of the New York Times before the Senate Subcommittees on Intergovernmental Relations, Separation of Powers, Administrative Practices and Procedure on 11 April 1973 recited the Times' experience on the Executive Order to date. His testimony was highly critical of the executive branch, including specifically CIA. A copy is attached. Mr. Houston commented in this regard that he knows Harding Bancroft rather well and he is certain that Bancroft realizes the matter is not nearly as simple as he suggested in his testimony. He indicated we would forward any comments on Bancroft's testimony. Tufaro suggested we might want to cover this in our comments on Rhoads' draft testimony.

10. Mr. Rhoads then went to the subject of the ICRC procedures, which have been approved by the Committee subject to the resolution of the question of the Committee's jurisdiction to hear appeals involving intelligence sources and methods. Mr. Houston indicated we had prepared a paper on that subject and we have also discussed the problem informally with the Department of Justice. It was left that we would proceed with this with Justice, or otherwise as we desire. But Mr. Rhoads said he would like to have action go forward so that the procedures can be approved at the June meeting. Mr. Houston said he saw no difficulty in accomplishing this.

11. Mr. Rhoads reported an invitation from the National Classification Management Society for the Committee to take part in a meeting the Society is conducting in Washington on 17 July. In the following discussion it developed that both Defense and AEC have had experience with the group. Defense has found it to be a good group, formed essentially of Defense contractors. AEC has found it to be somewhat civil-liberties minded (in a harassing sense) and AEC has dealt with it very cautiously. It was suggested that ICRC should participate in low key and only one representative should appear. The ICRC representative was not named and I assume it will be either Tufaro or Rhoads.

25X1A

Attachments

cc: ES/CIA Management Committee
DD/M&S

Associate General Counsel

SAIC ✓
OLC

KNOW YOUR RIGHTS TO MANDATORY REVIEW OF CLASSIFIED DOCUMENTS

A new system for classification and declassification of Government documents related to national security matters was established by President Nixon on March 8, 1972 through Executive Order 11652 (37 FR 5209). The new Executive Order represents the first major overhaul in the classification system in 20 years. For the first time all classified materials are subjected to an automatic declassification schedule, unless exempted from such schedule by an individual properly authorized. Such exemptions apply only to certain sensitive materials within four limited categories. The new Executive Order also establishes for the first time a mandatory review procedure whereby any member of the public or other department of the Federal Government can request declassification of any classified information or material 10 or more years old. This pamphlet is intended to set forth the procedures for requesting such a review of classified materials, the offices to which such requests must be directed, and the rights to which an individual is entitled at each step of the reviewing process.

THE REQUEST

A request for classification review must describe the document with sufficient particularity to enable the department to identify it and obtain it with a reasonable amount of effort.

Each request must be addressed to the appropriate office of the department having custody of the document of which disclosure is sought. (Addresses of such offices are listed on page 5.)

Responsibilities of Department. Whenever a request is deficient in its description of the record sought, the requester should be asked to provide additional identifying information whenever possible. Before denying a request on the ground that it is unduly burdensome, the requester shall be asked to limit his request to records that are reasonably obtainable. If nonetheless the requester does not describe the records sought with sufficient particularity, or the record requested cannot be obtained with a reasonable amount of effort, the requester shall be notified of the reasons why no action will be taken.

REVIEW WITHIN DEPARTMENT.

Records Ten to Thirty Years Old. An office receiving a request for declassification review is required to assign the request to an appropriate office within its Department for action. In addition, this office or the action office shall immediately acknowledge receipt of the request in writing to the requester.

If the request requires the rendering of services for which fair and equitable fees must be charged pursuant to Title V of the Independent Offices Appropriations Act, 1952, 65.290, 31 U.S.C. 483a, the requester will be so notified. At the present time the average fee is \$3.50 per man hour of work required to locate the requested document or documents.

The action office which has been assigned to review the declassification request shall thereafter make a determination within 30 days of receipt or shall explain the reasons why further time is necessary.

The determination that continued classification is required in the interests of national security may be made only if the classified information falls into one of the following categories:

- (1) Classified information or material furnished by foreign governments or international organizations and held by the United States on the understanding that it be kept in confidence.
- (2) Classified information or material specifically covered by statute, or pertaining to cryptography or disclosing intelligence sources or methods.
- (3) Classified information or material disclosing a system, plan, installation, project or specific foreign relations matter the continuing protection of which is essential to the national security.
- (4) Classified information or material the disclosure of which would place a person in immediate jeopardy.

Should the action office determine that continued classification is required under the criteria set forth above, the requester shall promptly be notified, and whenever possible, provided with a brief

statement as to why the requested information or material cannot be declassified.

The notice of determination shall also advise the requester of his right to appeal to the Departmental Committee required to be established under the new Executive Order.

Records More than Thirty Years Old. A request by a member of the public or by a department for a declassification review of documents more than 30 years old shall be referred directly to the Archivist of the United States. If the information or material requested has not been transferred to the General Services Administration for accession into the Archives, the Archivist shall, together with the department having custody, have the requested documents reviewed for declassification.

Classification shall be continued in either case only where the head of the department concerned makes a personal determination at that time that continued protection is essential to the national security or that disclosure would place a person in immediate jeopardy.

Should the department head determine that continued classification is required, the requester shall promptly be notified, and whenever possible, provided with a brief statement as to why the requested information or material cannot be declassified.

A notice of determination shall advise the requester of his right to appeal such adverse determination to the Departmental Committee required to be established under the new Executive Order.

DEPARTMENTAL COMMITTEE REVIEW.

A requester is entitled to appeal to the Departmental Committee when the action office has either rendered an adverse decision on a request for declassification or failed to make any determination within 60 days of receipt of the request.

The Departmental Committee established within each department to review requests for declassification shall act within 30 days upon all applications and appeals regarding requests for declassification. If action is not completed in 30 days, the requester may apply to the Interagency Classification Review Committee for appropriate relief.

If the Departmental Committee determines that continued classification is required under the criteria of the new Executive Order, it shall promptly so notify the requester and advise him that he may appeal the denial to the Interagency Classification Review Committee.

BURDEN OF PROOF FOR ADMINISTRATIVE DETERMINATIONS.

For purposes of administrative determinations with respect to any request for declassification review, the burden of proof is on the originating department to show that continued classification is warranted within the terms of the new Executive Order.

INTERAGENCY CLASSIFICATION REVIEW COMMITTEE.

An Interagency Classification Review Committee is established to assist the National Security Council in monitoring implementation of the new Executive Order. Its membership is comprised of a chairman designated by the President, the Archivist of the United States and a senior representative of the Departments of State, Defense, and Justice, the Atomic Energy Commission, the Central Intelligence Agency and the National Security Council staff.

The Interagency Committee, which meets regularly on a monthly basis, is charged to consider and take action on complaints or appeals from persons within or without the Government with respect to the general administration of the new Order and denials of requests for declassification of classified information or material more than 10 years old.

Complaints or appeals may be addressed to the Interagency Classification Review Committee, Executive Office Building, Washington, D. C. 20506.

AVAILABILITY OF DECLASSIFIED MATERIAL.

Upon a determination by the Interagency Committee that the requested material no longer warrants classification, it shall be declassified and made promptly available to the requester, if not otherwise exempt from disclosure under Section 552 (b) of Title 5 U. S. C. (Freedom of Information Act) or other provision of the law.

ADDRESS OF OFFICES TO WHICH REQUESTS MUST BE MADE.

Defense	Chief, Records Management Branch Office of the Asst. Secretary of Defense (Comptroller) Room 3B925 The Pentagon Washington, D. C. 20301
State	Chief, Record Systems Division State Department Washington, D. C. 20520
CIA	The Assistant to the Director Central Intelligence Agency Washington, D. C. 20505
Justice	Office of the Deputy Attorney General Department of Justice Washington, D. C. 20530
AEC	The Division of Classification U. S. Atomic Energy Commission Washington, D. C. 20545
NSC	Staff Secretary National Security Council Executive Office Building Washington, D. C. 20506
ACDA	Chief, Communication and Reference Service Center U.S. Arms Control & Disarmament Agency State Department Washington, D. C. 20451
AID	Director, Office of Public Affairs Agency for International Development Washington, D. C. 20523
USIA	Assistant Director Office of Public Information U. S. Information Agency Washington, D. C. 20547
Treasury	Assistant Secretary for Administration Department of the Treasury Washington, D. C. 20220

CAB	Chairman, Intra-Agency Committee Civil Aeronautics Board Washington, D. C. 20428
Export-Import Bank	Executive Vice President Export-Import Bank of the United States 811 Vermont Avenue, NW Washington, D. C. 20571
GSA	General Services Administration GSA Security Officer Washington, D. C. 20405
CSC	Security Officer United States Civil Service Commission Washington, D. C. 20415
EPA	Director, Security and Inspection Division Environmental Protection Agency Washington, D. C. 20460
DOT	Director of Investigations and Security TAD-50 Office of the Secretary of Transportation 400 7th Street, S. W. Washington, D. C. 20590
FCC	Executive Director Federal Communications Commission 1919 M Street, N. W. Washington, D. C. 20554
FMC	Office of the Secretary Federal Maritime Commission Washington, D. C. 20573
FPC	Office of The Secretary Federal Power Commission Washington, D. C. 20426
Canal Zone	Office of the Executive Secretary of the Canal Zone Post Office Box M Balboa Heights, Canal Zone

Agriculture	Department Security Officer Office of Personnel Administration Building U. S. Department of Agriculture Washington, D. C. 20250
NSF	Security Officer (Information) National Science Foundation 1800 G Street, N. W. Washington, D. C. 20550
ICC	Office of the Secretary Interstate Commerce Commission Washington, D. C. 20423
Commerce	Director Office of Investigations and Security Room 5044 Main Commerce Building 14th Street, N. W. Washington, D. C. 20230
OMB	Office Review Committee Office of Management and Budget Washington, D. C. 20503
ACTION	General Counsel ACTION Washington, D. C. 20525
NASA	NASA Security Classification Officer Code DHZ Washington, D. C. 20546
Labor	Office of the Assistant Secretary for Administration and Management Department of Labor Washington, D. C. 20210
Interior	Chief, Division of Records and Protective Services Office of Management Operations U. S. Department of the Interior Washington, D. C. 20240

HEW

Department of Health, Education & Welfare
Office of Internal Security
330 Independence Avenue, S.W.
Washington, D.C. 20201

THE WHITE HOUSE
WASHINGTON

May 2, 1973

LETTER OF INTERPRETATION

Information or material classified pursuant to Executive Order 10501 or a predecessor order and marked Group 3 under Section 4(a)(3) of that Order is subject to automatic downgrading at 12 year intervals until the lowest classification is reached, but shall not become automatically declassified. Section 5(D) of Executive Order 11652 intends nothing to the contrary.

Appropriate action should be taken to implement this letter of interpretation and to advise the undersigned accordingly.

James B. Rhoads
Acting Chairman
Interagency Classification Review
Committee

HARDING F. BANCROFT
Executive Vice President, The New York Times

before the

SENATE SUBCOMMITTEES ON
INTERGOVERNMENTAL RELATIONS,
SEPARATION OF POWERS,
ADMINISTRATIVE PRACTICES AND PROCEDURE

Wednesday, April 11, 1973

INTRODUCTION

I am glad to appear today in response to your request for a report on the experience of The New York Times under the Freedom of Information Act, particularly our experience since the issuance in March 1972 of Executive Order 11652. In the light of that experience, I am delighted to give our comments on S. 1142, introduced by Senator Muskie, proposing amendments to the Freedom of Information Act.

When the Freedom of Information Act was signed on July 4, 1966, President Johnson stated that it sprang "from one of our most essential principles: A Democracy works best when the people have all the information that the security of the nation permits". "No one" he said "should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest."

And the Attorney General in a memorandum to assist government agencies in developing a uniform and constructive implementation of the law said that it "imposes on the executive branch an affirmative obligation to adopt new standards and practices for publication and availability of information." "It leaves no doubt", he said, "that disclosure is a transcendent goal."

In the years since the act became effective on July 4, 1967, that transcendent goal has not been realized.

New York Times reporters have had great difficulty in securing non-sensitive information to which the public is clearly entitled. We have met official resistance in respect to such matters as the number of medals awarded to Generals in the Vietnam War, the identity of contractors found to have made excessive profits by the Renegotiation Board, reports of government tests on consumer products, and so on.

When, however, Executive Order 11652 was issued by President Nixon, it created new hopes. As the President noted in his accompanying statement, it was "designed to lift the veil of secrecy which now enshrouds altogether too many papers written by employees of the Federal establishment". In what he called "a critically important shift," the order put the burden on those who wish to preserve secrecy

rather than those seeking declassification. And the President appeared emphatic in his intention to make the new procedures work. "The full force of my office", he said, "has been committed to this endeavor".

But now, on the basis of The New York Times experience over the 13 months since the executive order was issued, I must give you a weary and negative report. If the veil of secrecy has been lifted at all, only a thin sliver of light now shows through. If the "critically important shift" in the burden for preserving secrecy has taken place, that is barely evident. There is no outward or visible sign that the President has, in fact, committed the full force of his office to this task. If he has, it has fallen on a disingenuous bureaucracy and the intolerable abuses of the security system that the President spoke of have not been eliminated.

In quick summary, since June 1972 we have formally requested declassification of 51 sets of documents, all at least 10 years old, and many going back 25 or more years. In four cases, we succeeded without appeal, one declassification coming just a week ago after almost 10 months of effort on our part. In another case, we succeeded only after an appeal and then a re-appeal. Another request remains on appeal, still another is pending original decision.

Approved For Release 2001/08/28 : CIA-RDP75B00380R000600040015-0
That gives us a batting average so far of 5 for 49, or

.102 — not good enough even for the minor leagues. And, this meager 10 per cent success record has come only after persistent efforts by The Times, efforts which are beyond the means of many smaller news organizations, let alone individual scholars and members of the public. We have come to conclude, as a result, that the President's emphatic order is not enough, and that in declassification as in the American League, what is now necessary is a Designated Pinch Hitter, a compelling legislative response.

THE TIMES EXPERIENCE UNDER E.O. 11652

Executive Order 11652 called for the automatic declassification of most documents within no more than 10 years. Some materials could be specifically exempted, but even these were subjected to mandatory review if requested by a member of the public.

The Times sought to respond to this opportunity in a serious fashion. On Monday, June 5, four days after the executive order took effect, we initiated our first of a series of declassification requests which amounted in all to 51. These were directed to five agencies, on topics ranging from United States relations with the French Resistance in World War II, to the Bay of Pigs.

It is necessary to recount only a few of the responses to indicate why we have come to feel almost total frustration now that we have gone from the President's commendable language to the bureaucracy's dissembling or arbitrary actions.

Approved For Release 2001/08/28 : CIA-RDP75B00380R000600040015-0

The precise nature of our experience has varied from agency to agency, but with the same general result. After numerous exchanges of calls and letters, usually over months, the buck is passed to another agency; or reasonable conditions in the executive order are used to block declassification without explanation; or expensive charges are proposed; or requests are denied, with an appeal suggested, though the reasons for denial — and hence for the appeal — are refused.

One notable instance began on June 5 when we asked the Department of Defense for the comments of the Joint Chiefs of Staff on the Bay of Pigs operation. In a report dated July 24, the Department responded: "The JCS papers can be identified and placed under review." So far, so good. But then on August 8, we were told, "It turns out that the papers in question are in fact comments on documents prepared by another agency and, therefore, your request cannot be handled as a review separate from the basic collection of documents which, as you know, is under the control of the Central Intelligence Agency." (Emphasis supplied).

We responded to Defense (protesting "agile side-stepping and backpedaling") and, on August 9, made a new formal request to CIA for the documents. Having received no response, we wrote again on September 6, specifying particular interest in the JCS comments. On September 25, CIA replied that it could not meet our request, the reasons given were a bureaucratic tour de force.

For one thing, CIA wrote, "we do not hold a specific group of documents formally identified as 'the basic collection' ". Second, while the agency acknowledged having a large volume of documents relating to the Bay of Pigs, "your request does not fulfill the requirement of sufficient particularity to fall within the Executive Order." We pointed out that "...identification of specific documents could be made only by employees of CIA, the National Security Council, or the Departments of Defense and State. Merely to cite a lack of particularity... is to seize a technicality to frustrate the Executive Order and ignore the accompanying statement by the President."

Further, even if we had been able to divine the identity of specific, highly classified documents more than 12 years old as a pre-condition of their being declassified, CIA erected yet another obstacle. In the same September 25 letter, CIA wrote that intertwined among the documents were "a large number of references to or reflections of intelligence sources and methods which could be jeopardized by release of these documents". Thus, CIA argued that the papers fell within an exemption in the executive order protecting intelligence sources and methods. To separate out still sensitive material, CIA wrote, "is simply not feasible".

In other words, Defense was prepared to review the material for declassification, but then backed off because it was in CIA's "basic collection". CIA said it had no "basic collection".

Approved For Release 2001/08/28 : CIA-RDP75B00380R000600040015-0
Nor, could it identify, among the files it did have, documents that

Defense could identify. And even if it could identify the documents, CIA said it was sure — even without any review — that they could not be declassified.

Finally, at the end of the letter, CIA wrote that it had consulted with Defense as to the JCS comments on the Bay of Pigs. In this specific instance, neither insufficient particularity nor jeopardizing intelligence sources could credibly be cited as reasons for refusing. But, in the absence of valid reason for refusal, we were simply refused without a reason. The CIA letter merely said, "We jointly agree that the JCS documents cannot be released." Only since we appealed this multi-layered denial has CIA relented somewhat. In a letter received just last week, the agency backed off its claim that our request lacked particularity. Now, on direction of the appeals committee, the agency says it will, at least, conduct a complete review.

We had different frustrations with the Department of State, to which we sent requests for 31 documents. At length, under some prodding from the National Security Council staff, the Department attempted more seriously than others to be constructive and helpful. Three of our five successes involved the State Department.

But even before this meager achievement, we were subjected to a remarkable exercise. On June 27, we recieved a short,

Approved For Release 2001/08/28 : CIA-RDP75B00380R000600040015-0
blanket denial of the 31 requests previously made on the grounds of

insufficient particularity. Then, the NSC staff urged State to make at least a gesture of good faith compliance — if not with The Times requests, then at least with the President's order. State subsequently offered a new response. Yes, the Department wrote us, it could search for the information we requested, but The Times would have to foot the bill. Not the bill for the copying, which would make sense, but a bill estimated by the Department in the thousands of dollars — for searching out the documents themselves, which makes no sense. Aside from the amounts involved which could be prohibitive for The Times, and totally out of the question for smaller organizations, scholars, or private citizens, there are other practical considerations. Even if we agreed in advance to pay open-ended fees for searching out the relevant documents, the Department could not promise that any of them would, in fact, be declassified and made available to us.

And even after the payment of these fees, and even if the documents were declassified, there was no way in the world for us to know if they were worth reporting. I can readily understand the exasperation that last June prompted Max Frankel, then our Washington Bureau chief, in a letter to the head of Declassification at the White House, to describe this all as "research roulette".

Ultimately, we paid \$124 in research assessments and \$70 in copying charges for the three sets of documents finally declassified

Approved For Release 2001/08/28 : CIA-RDP75B00380R000600040015-0

by the State Department. (Among the copies charged for were European newspaper clippings that had been classified). None of the documents turned out to be newsworthy.

The single newsworthy success we have achieved so far concerned the Gaither Report on the asserted missile gap of the last 1950s. Our original request to Defense was re-directed to the National Security Council. At length, the NSC rejected the request without specifying a reason. We appealed to the Inter-Agency Review Committee on October 22. Three months later, the committee acted favorably on our request.

The fifth success should not, perhaps, be described as a success at all. It concerned a request to several agencies for documents relating to the exchange of Rudolph Abel for Francis Gary Powers. Last week, almost seven months after our request, we received a set of relevant papers from the Department of Justice. None of these appear to be newsworthy.

The instances I have cited so far illustrate how agencies have used (1) delay; (2) "insufficient particularity"; (3) protecting intelligence sources; and (4) costs, as obstacles to declassification and disclosure. The Defense Department provided us with yet another. One of our original requests to that Department was for the answers to the "100 questions" that Secretary Robert McNamara issued at the start

Approved For Release 2001/08/28 : CIA-RDP75B00380R000600040015-0

of his tenure. In response to our request, the Department said there was not, "to the best of our knowledge", any documentary assessment of the answers. "To prepare a summary at this time would involve an unreasonable amount of work", the Department wrote. Perhaps so, but it would have been more credible had the Department even tried to provide answers to some of the questions. As it stands, the Defense response invites the suspicion that the Department regards punctual declassification as too much trouble; that conforming to the strong views of the President is too much trouble; that informing the public is too much trouble.

It ought to be sufficient, in response to statements like "an unreasonable amount of work" or to the other bureaucratic evasions we have experienced, to cite the following words:

"The many abuses of the security system can no longer be tolerated. Fundamental to our way of life is the belief that when information which properly belongs to the public is systematically withheld by those in power, the people soon become ignorant of their own affairs, distrustful of those who manage them, and —eventually— incapable of determining their own destinies."

Those words come from President Nixon's statement accompanying the Executive Order. They reflect an effort to strike a reasonable balance

Approved For Release 2001/08/28 : CIA-RDP75B00380R000600040015-0
between the Government's need for confidentiality and the public's right to be informed. Yet if after the application of what the President called "the full force of my office", the persistent efforts of a major newspaper can produce a production average of only .102, then we and the people of this country must look to Congress and the courts.

S-1142

Given these problems and the sad and repeated history of unresponsiveness by the governmental functionaries from whom documents have been sought under the Freedom of Information Act, we are especially pleased at the introduction of S-1142 by Senator Muskie and others. We believe that these amendments will have a salutary effect on the practical operation of the Act and will increase although not guarantee the ability of the press to obtain governmental information which should properly be in the hands of the public.

Without specifically reviewing each of the changes which would be affected by the adoption of S-1142, I think it may be useful to consider some of them that we think would be especially significant. One of these is the proposed amendment to Section 552A(3) which would, in effect, substitute the words "records which are reasonably described" for "identifiable records". This would help to eliminate one of the excuses which unwilling officials have repeatedly used to prevent disclosure. One problem, obviously, that a journalist has in seeking

official records from governmental agencies is knowing precisely what records the agency has. This was exemplified in the Bay of Pigs request. At least one of CIA's excuses in that case would be much less likely to be sustained under the new proposed language.

Secondly, the amendment expressly providing that, in a review by the Court, the Court has the power to examine the contents of any agency records in camera in order to determine if such records or any part thereof should be withheld under one of the statutory exemptions, is a particularly important one.

This amendment would meet and change the decision of the Supreme Court in the recent ruling in Environmental Protection Agency v. Mink, decided in January of this year. In that case, the Court in disallowing in camera judicial inspection of classified documents relating to possible environmental dangers of the Gannikin atomic test in the Aleutians construed most narrowly the exemptions contained in the Freedom of Information Act. Justice Stewart observed in his concurring opinion in that case that Congress:

"has ordained unquestioning deference to the Executive's use of the 'secret' stamp."

Indeed, Justice Stewart observed that Congress had:

"built into the Freedom of Information Act an exemption that provides no means to question an executive's decision

Approved For Release 2001/08/28 : CIA-RDP75B00380R000600040015-0
to stamp a document 'secret', however cynical,

myopic or even corrupt that decision might have been."

We think the Freedom of Information Act, if it is worthy of its name or declared purposes, should not be susceptible to such an interpretation. It is of fundamental importance that a court have the power to review the contents of records sought by newspaper reporters and that courts not be bound by a security classification placed upon documents up to 30 years ago by a cautious civil servant, — let alone a "cynical, myopic or even corrupt" one. We urge the Congress to adopt legislation making clear that courts are free and even bound to examine the correctness of the classifications, at the time the demand for the document is made. That is the important time. The judicial eye can see with clearer vision than a reluctant bureaucrat that the need for secrecy, even if real in one year may be non-existent the next; and that the public is entitled to be aware of recent as well as ancient history.

This amendment, it seems to us, is also supported by Executive Order 11652, which calls for the separation of documents into classified and unclassified portions where that is practicable. It has been our experience that such a separation is practicable in the vast majority of cases, and that one of the dismaying features of the current classification system is that documents containing 95% of

material which should never have been classified at all are classified "top secret" or "secret" because of a reference or a single sentence or paragraph contained in the document.

Similarly, the provisions of the proposed amendments establishing effective and binding time limits for agency determination and appeals will be most helpful in ensuring that prolonged delays of the type that we have experienced will not frustrate the purposes of the Act. In the journalistic field, stories that cannot be run when they are newsworthy often cannot be run at all. Reluctant officials are all too aware of this.

We also find most useful and needed the proposed revisions in S-1142 to exemption 7 of the Freedom of Information Act so as to exclude from the exemption certain investigatory records such as scientific data, agency inspection reports relating to health, safety or environmental protection, and records serving as a basis for certain public policy statements of government officials. There is simply no reason for such material to be kept secret.